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IN THE SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1980

No. 80-1889

BERNARD W. PIANKA,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF GEORGIA

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Petitioner prays that a Writ of Certiorari issue to review the judgment of the Georgia Court of Appeals entered in the above-captioned case.

QUESTIONS PRESENTED

1. Does the "open fields" doctrine of Hester v. United States justify a warrantless aerial surveillance of a fenced, posted, isolated farm, specifically the trailer-home and areas immediately surrounding the residence, where the aerial search was conducted in a non-routine manner without probable cause and for the sole purpose of searching for contraband?

2. Did Katz v. United States overrule or modify the "open fields" doctrine enunciated in Hester v. United States?

3. Can an individual have a reasonable expectation of privacy in an area which might traditionally be considered

an "open field" where he purposefully excludes others, fences and posts the property, has locked entrances and the geography of the area precludes normal observation?

4. Must the Government meet the prerequisites of the plain view doctrine that (1) officers are lawfully in the position to obtain the view; (2) discovery is inadvertent; and (3) object viewed is immediately seen to be incriminating in order to justify an "open field" exception to the Fourth Amendment?[1]

[1]Other parties to the proceeding: Petitioner was tried along with three Co-Defendants: Norman E. Williams, Marion W. Moore and Donald C. Davis, Jr. The Georgia Court of Appeals affirmed the convictions of Williams, Pianka and Davis, while reversing as to Moore. These individuals are the only other parties to the action.

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OPINIONS BELOW

The Supreme Court of Georgia denied Petitioner's Application for Writ of Certiorari on March 13, 1981. The opinion of the Georgia Court of Appeals affirming Pianka's conviction, Appendix A, attached hereto, is as yet unreported.

JURISDICTION

The Supreme Court of Georgia denied Petitioner's Application for Writ of Certiorari on March 13, 1981. This petition for a Writ of Certiorari was filed within 60 days of that date pursuant to Rule 20(1). This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects,

against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

United States Constitution, Amendment Fourteen, Section One:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; or deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

A. General Background:

Bernard W. Pianka and his three Co-Defendants were convicted after a bench trial in Tattnall County Superior Court, Georgia for possession of mari-

juana. The Court sentenced Pianka to ten (10) years incarceration with five (5) years probated upon payment of a twenty-five thousand ($25,000.00) fine. Pianka appealed to the Georgia Court of Appeals which affirmed his conviction and that of two of his Co-Defendants. One Co-Defendant's conviction was reversed. The Court of Appeals based its decision on the "open fields" doctrine of Hester v. United States, 265 U.S. 57 (1924). Bernard W. Pianka petitioned for a Writ of Certiorari which was denied by the Georgia Supreme Court.

B. Manner in which Federal Question Was Raised.

The federal question presented herein was originally raised by Pianka, by his timely filing of a Pretrial Motion to Suppress Illegally Seized Evidence. The Trial Court conducted a lengthy hearing on Defendant's motion, receiving evidence and testimony by both

the State and defense. The Trial Court filed an Order including findings of fact and conclusions of law. [attached hereto as Appendix B] The Court basically concluded that the search was legal based on the "open fields" doctrine. Following the Trial Court's denial of said Motion to Suppress a bench trial was conducted. Defendant renewed his continuing objection to the introduction of any evidence seized as a result of the searches and seizures. The transcript of trial, May 9, 1980 at p. 3-4 contains the following statement of the Court:

> "THE COURT: 'All right. Then the case 79-18 pending in the Superior Court of Tattnall County, State of Georgia against Norman E. Williams, Marion W. Moore, Donald C. Davis, Jr. and Bernard W. Pianka, counsel for all parties, the defendants themselves and the State having announced ready and the suggestion having been made that any objection to--that would be proper under--as to the admissibility of evidence under the Fourth Amendment of the United States Constitution

> that it be a continuing objection, there being no disagreement by the State in this regard. It's accepted and as to each item of evidence that's introduced, the Court accepts the statement that there is an objection by each defendant, that is by the Defendant Williams, by the Defendant Moore, by the Defendant Davis and by the Defendant Pianka to each and every item of evidence. All right'."

The denial of Defendant's Motion to Suppress Illegally Seized Evidence was the basis and sole enumeration of error raised with the Georgia Court of Appeals. The Court of Appeals affirmed Defendant's conviction finding that the denial of Defendant's Motion to Suppress was proper under the doctrine enunciated in Hester v. United States. This issue was again raised in Pianka's Application for Writ of Certiorari to the Georgia Supreme Court, although the Supreme Court denied Pianka's Petition.

The Federal question presented herein has thus been properly raised and

appropriately preserved at all stages of this case.

C. Facts Material to the Questions Presented

Norman Williams, a Co-Defendant below, purchased a 2,000 acre farm in an isolated area of Tattnall County, Georgia. Upon buying the property, Williams placed gates with locks on all roads leading to the farm. He completely fenced the area and at each juncture "no trespassing" signs were posted. Neighbors were informed that trespassing would no longer be tolerated.

The farm, had an air strip already constructed on it at the time that it was purchased by Norman Williams. This air strip had been used by Williams and the previous owner of the farm for legitimate farming purposes. The physical environment surrounding the farm precludes any

observation of the air strip, which is located near the mobile home, or area immediately surrounding the air strip and mobile home. This area is heavily wooded by live oak trees which have full foliage year round. Williams, Moore and Pianka lived in this mobile home during their visits to the farm.

The purchase of this large amount of land, by a relatively young person who was not a resident of the local area, stimulated some rumor that illegal activites may have been going on at the farm. These rumors were conveyed to certain members of law enforcement. State law enforcement officers then conducted an investigation into Norman Williams and Marion Moore, who owned adjoining property.

In addition, United States Customs Officers admittedly trespassed onto the property of Norman Williams and conducted non-rountine surveillances of the farm.

No information was obtained as a result of these surveillances.

On the date of the instant search, a state law enforcement officer received a telephone call indicating that a plane was flying over or had landed in the vicinity of Norman Williams' farm. No other information was known by the officer concerning this aircraft. The officer, Agent Butler, immediately obtained a law enforcement aircraft and pilot and flew directly to the farm, focusing on the limited area where the mobile home was located. The sole purpose of the aerial surveillance was to search for contraband on the farm. The officers admitted that there was no probable cause for a search at that time.

The law enforcement aircraft circled the farm at a very low altitude of approximately 500 feet, although the pilot admitted that he may have gone below that altitude at times. While circling this

area in the aircraft, Agent Butler, saw an airplane parked very close to the trailer and saw a blue truck behind the trailer. It was his testimony, that the airplane was parked within 25 feet of the trailer. Because it was a cloudy day, the law enforcement aircraft lost sight of the airplane and trailer for a period of minutes. Upon again circling the area immediately above the mobile home, the aircraft which had been parked adjacent to the trailer had departed. Based on the information that an airplane had been present and the blue truck's proximity to the mobile home and airplane, Agent Butler directed the pilot to continue circling and look for the blue truck. When the blue truck was spotted, the Agent testified that he saw the Petitioner and Co-Defendant Davis unloading bales that the officer suspected were marijuana.

Based on these observations, Agent Butler directed other law enforcement agents on the ground, to enter the premises. Officers shot the lock off of the gate and entered the farm area traveling approximately one-quarter of a mile to the area immediately near the mobile home. They arrested Williams in his vehicle at this point. They continued past the trailer on a dirt road to where the blue truck was sighted. The Petitioner was arrested at that location. The officers then searched an area approximately 200-300 feet from the blue truck and found bales of marijuana which were covered in burlap and plastic.

After all of the Defendants were arrested and the trailer "secured" the officers continued searching the farm and discovered other bales of marijuana. All of the activities described above were conducted without a search warrant.

Several hours later the officers obtained a search warrant for the trailer. They returned to the farm and searched the mobile home. The sheriff took a rental car belonging to Marian Moore back to his office for "safe-keeping." He later opened the trunk of that car and discovered a bale of marijuana.

The Defendants were indicted for possession of marijuana in violation of the Georgia Controlled Substances Act.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW IS IN CONFLICT WITH OTHER FEDERAL AND STATE COURT DECISIONS.

Georgia's interpretation of Hester v. United States, supra, as it applies to the Fourth Amendment follows the decisions of other State and Federal Courts holding that Katz v. United States, 389 U.S. 347 (1967) did not substantially effect the "open fields" doctrine.

People v. Lashmett, 71 Ill.App.3d 429, 389 N.E.2d 888 (1979); State v. Dow, 392 A.2d 532, 536 (S.Ct. Me. 1978); United States v. Bensinger, 489 F.2d 865 (7th Cir. 1973); Wattenburg v. United States, 388 F.2d 853 (9th Cir. 1968); United States v. Pappas, 600 F.2d 300 (1st Cir. 1979); State v. White, 118 Ariz. 47, 574 P.2d 840 (1978). All of these cases are directly in conflict with other State and Federal cases finding that Hester was substantially overruled by Katz and/or retains little vitality. People v. McClaugherty, 566 P.2d 361, 362 (S.Ct. Colo. 1977); Norman v. State, 379 So.2d 643, 647 (Fla.S.Ct. 1980); United States v. Freie, 545 F.2d 1217 (9th Cir. 1976); Conrad v. State, 63 Wis.2d 616, 218 N.W.2d 252 (1974); State v. Wert, 550 S.W.2d 1 (Tenn.Cr.App. 1977); Nathanson v. State, 554 P.2d 456 (Alaska 1976). See gen., W. Lafave, SEARCH AND SEIZURE § 2.4, p. 333 (1980).

The confusion among these State and Federal Courts has continued without any substantial guidance from this Honorable Court. Recent cases support the theory that Hester was not overruled sub silentio by Katz. Air Pollution Variance Board v. Western Alfalfa, 416 U.S. 861 (1974); G. M. Leasing v. United States, 429 U.S. 338, 352 (1978); United States v. Santana, 427 U.S. 38 (1976). Post Katz United States Supreme Court cases citing Hester now appear to include a Katz reasonable expectation of privacy requirement. The language of Katz that: "Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures" [emphasis supplied], Id. at 359, has lead some State and Federal Courts to conclude that Hester's "open fields" doctrine is merely an application of the principle that Fourth Amendment protections do not apply where no reasonable expectation of pri-

vacy exists. People v. McClaugherty, supra. See, 1 Wharton's CRIMINAL PROCEDURE § 150 (12th ed. C.E. Torcia 1974); United States v. Freie, supra, at 1223.

Many courts have requested guidance in this area and are unable to determine whether Hester is viable or the extent to which it was modified by Katz. See, e.g., State v. Lakin, 588 S.W.2d 544, 547 (S.Ct.Tenn. 1979); Commonwealth v. Janek, 363 A.2d 1299 (Pa.Super. 1976). See also, United States v. Williams, 581 F.2d 451 (5th Cir. 1978); United States v. DeBacker, 493 F.Supp. 1078 (W.D. Mich. 1980); Amsterdam, Perspectives on the Fourth Amendment, 58 Minn.L.Rev. 349 (1974).

The application of the "open fields" doctrine has created conflicting cases. Numerous courts view "open fields" as another name for "plain view." State v. Stachler, 570 P.2d 1323 (S.Ct.Hawi. 1977). See also, State v. Fearn, 345

So.2d 468 (La. 1977). Some Courts require that the "plain view" requirements enunciated in Coolidge v. New Hampshire, 403 U.S. 443 (1971) must be met in order to justify an "open field" exception. State v. Fearn, supra; Wilson v. Health & Hospital Corp., 620 F.2d 1201 (7th Cir. 1980); State v. Osborn, 63 Ohio Misc. 17, 409 N.E.2d 1077 (1980). The Georgia Court in the instant case and the majority of Courts and jurisdictions have failed to require any Coolidge prerequistes before finding that a warrantless "open fields" exception is a valid search. See, Shiner, Police Helicopter Surveillance, 15 Ariz.L.Rev. 145 (1973).

At the heart of the growing discord among the State and Federal Courts is the question of the proper interpretation of Hester in a post-Katz era. Guidance is needed as to the application of that doctrine in light of Coolidge v. New Hampshire. As noted in the number of

cases above, this conflict will continue to grow until this Court rules whether this type of "open field" searchs are Constitutionally permissible.

CONCLUSION

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

OPINION OF GEORGIA COURT OF APPEALS

60871. WILLIAMS et al. v. THE STATE
29-207

DEEN, Presiding Judge.

Williams, Pianka, Davis and Moore were convicted of felony possession of marijuana. We first discuss the motion to suppress of the first three defendants.

1. Pursuant to information received from U.S. Customs, the G. B. I. sent a surveillance plane over a large generally wooded area owned by Williams, having on it a trailer and airstrip, and partly fronting the banks of the Ohoopee River. The occupants saw an airplane on an airstrip near a trailer in the approximate center of the property, along with two trucks and other cars parked nearby. Under cloud cover the airplane vanished but one of the trucks was then seen in an open area near the river unloading objects which they rightly assumed to be

bales of marijuana. They notified other peace officers who had arrived on the ground outside the fenced premises and these men immediately shot out the lock of a gate across the road, entered, and under radio guidance with the G. B. I., the airplane went directly to the unloading scene, arrested Pianka and Davis, and located 45 bales of marijuana under nearby vegetation at the side of the road. Then turning back toward the trailer they came upon Williams in a jeep who, when he saw them, attempted an unsuccessful evasive maneuver.

The defendants first contend that since the area was fenced by strands of barbed wire and locked gate across the road the officers on ground patrol had no right to enter and conduct the warrantless search; secondly, if the information they had be held to constitute probable cause, that information itself was tainted as emanating from a surveillance

airplane which violated their constitutional right to expectations of privacy.

The expectation of privacy defense is based on Katz v. United States, 389 U. S. 347 (88 SC 507, 19 LE2d 576) (1967) which it is urged has interred the open fields doctrine developed by Hester v. United States, 265 U. S. 57, 59 (44 SC 445, 68 LE 898) (1923) and its progeny. This conclusion is unsupported. Air Pollution Variance Board of the State of Colorado v. Western Alfalfa Corp., 416 U. S. 861 (94 SC 2114, 40 LE2d 607) (1974). Reece v. State, 152 Ga. App. 760 (264 SE2d 258) (1979). McDowell v. United States, 383 F2d 599 (1) (1967). Katz involved the reasonable expectations of privacy of one making a call from a telephone booth (which had been outfitted with electronic eavesdropping equipment) not to be overheard. This is a far cry from a visual sighting from an airplane which admittedly was flying at a lawful

height over the premises. Visual surveillance from an airplane has been held not illegal. (People v. Superior Court etc., 37 Cal. App. 3d 836, 112 Cal. Rptr. 764 (1964) unless, as in People v. Sneed, 32 Cal. App. 3d 535, 108 Cal. Rptr. 146 (1973), where the helicopter decended to an elevation of 25 feet or less and thus obviously intruded upon the peace and well being of persons on the ground. The mere fact, however, that the person observed has an expectation of privacy is not the whole story; if it were, every harborer of contraband would be entitled to immunity from observation because surely unless he expected to remain undiscovered he would not risk possession of property carrying a highly undesirable penalty. The expectation must be reasonable, and it is no more unreasonable to expect an airplane to fly over a farm or wooded area at a legal distance from the ground as provided by federal regulations

than to expect a passer-by, whether he be a police officer or not, to look past the strand of barbed wire separating an open field from a highway and, if he sees an illegal activity in progress, to enter the property for the purpose of arresting the protagonists. The sky, like the road, is a highway over which those licensed to do so may pass so long as they keep a proper vertical distance between their craft and the property of others. The fact that the information of the defendants' activities was obtained in this manner does not render it unuseable.

2. There were two occupants in the airplane which, after flying over the area, landed on the airstrip and met the sheriff and his party. The latter, following directions, had proceeded to the river area and arrested the defendants Pianka and Davis in the truck and later stopped and arrested Williams in

the jeep. The testimony clearly establishes that the ground party was too small to contain the premises without entry, that it took over three hours to return to town and obtain a search warrant (which was done for the examination of the trailer), and that the report of Little in the plane of the activities of the defendants and the resemblance of the observed objects to bales of marijuana, combined with previous information regarding suspected activities at that location all combined to establish probable cause to believe a felony was in progress together with exigent circumstances making immediate action necessary. "When a police officer is the informant the reliability of the informant is presumed as a matter of law." Quinn v. State, 132 Ga. App. 395, 396 (1) (208 SE2d 263) (1974). Where there is communication between the two, probable cause can rest upon the collective

knowledge of the various peace officers involved. Perryman v. State, 149 Ga. App. 54, 56 (3) (253 SE2d 444) (1979). "The exigencies of time and the possible removal of the contraband to another state created an emergency -- an 'exigent circumstance.' United States v. Rabinowitz, 339 U.S. 56 (70 SC 430, 94 LE 653) (1950)." Andreu v. State of Ga., 124 Ga. App. 793, 797 (186 SE2d 137) (1971). A later trespass does not render inadmissible in evidence knowledge legally obtained. Hester v. United States, 265 U. S. 57, supra, and see Patterson v. State, 133 Ga. App. 742 (4) (212 SE2d 858) (1976), a case in which Justice, then Judge Marshall approved Mr. Justice Harlan's concurring opinion in Katz which limns the contrasting natures of an open field and a telephone booth where search and seizure are involved. Id., p. 747.

The law enforcement officers involved had probable cause to enter the Williams property and arrest both the defendants found in the truck and Williams himself, as he apparently attempted to turn away from them in the jeep and re-enter the woods. In the latest case on this subject, Giddens v. State (case no. 60223, decided Oct. 10, 1980), this court reiterated its adherence to the open field doctrine enunciated in Hester v. United States, 265 U. S. 57, supra, but drew a distinction between a non-dwelling structure and one which might be used as a dwelling place, as was the tent in Kelley v. State, 146 Ga. App. 179 (245 SE2d 872) (1978). Since it fell in the latter category the officers very properly refused to search the trailer until after the search warrant had been obtained. The motion to suppress was properly denied and the convictions of Williams, Davis and Pianka are without error.

3. The conviction of Marion Moore, however, rests on a different basis. While the cache of marijuana was being retrieved, certain officers returned to town to make affidavit and obtain a search warrant for the trailer. They returned to the farm with this instrument and searched the trailer (from which they had already removed the defendant Marion Moore and placed her under arrest, but without making a further search), later submitting an inventory of items removed from the structure under the search warrant which included the keys to a Ford Thunderbird, one of two rental cars parked outside. This car was driven to town with the intention of returning it to the lessors, but on alighting the police officer unlocked and inspected the trunk of the vehicle and found another bale of marijuana therein.

Although the officers knew at the time they obtained the warrant that

various automobiles were parked in close vicinity to the trailer, the warrant asked only permission to search the trailer itself, not the yard or premises or vehicles or any other object in its vicinity. We are constrained to hold that testimony concerning the bale of marijuana found in defendant Moore's automobile was therefore erroneously admitted in evidence. The universally recognized rule is that a search without a warrant is per se unreasonable unless it falls within certain clearly defined exceptions. Schneckloth v. Bustamonte, 412 U. S. 218 (93 SC 2041, 36 LE2d 854) (1973). Bunn v. State, 153 Ga. App. 270, 272 (265 SE2d 88) (1980). On occasion where one, in the course of an instrusion for which a prior justification exists comes inadventently upon a piece of incriminating evidence, such evidence is admissible on the basis that no infraction of Fourth Amendment rights was

intended. Coolidge v. New Hampshire, 403 U. S. 443 (91 SC 2022, 29 LE2d 564) (1971). The discovery of the bale of marijuana in the trunk of the automobile leased by Ms. Moore is attempted to be justified by means of testimony of the officer involved that he did not intend to search the car, that his removing the keys from the ignition switch, carrying them around to the back of the vehicle and proceeding to unlock and open the trunk was an inadvertent act, and that after the trunk was opened the contraband was in plain view. The act may have been "inadvertent in the sense that it was normal or habitual or even that it was the result of ordinary curiosity, but none of these motives would render proper an act otherwise a violation of Constitutional requirements.

It is also argued that the right to search the car trunk was permissible because the bailee, Ms. Moore, had been

placed under arrest when she emerged from the trailer prior to the obtention of the search warrant and the vehicle might have been searched at that time, in which case the fact that it was first moved to another location would not render the search impermissible. Glover v. State, 139 Ga. App. 162 (227 SE2d 921) (1976). However, this only obtains when the arrest is lawful. No grounds for this defendant's arrest were known at the time it was made. Cf. Beck v. Ohio, 379 U. S. 89, 91 (85 SC 223, 13 LE2d 142) (1974). The only fact known about her at that time was that she was in propinquity with others who were engaged in transferring contraband at a position on the premises about a half mile away. Mere propinquity does not without more justify either arrest or search. Sibron v. New York, 392 U. S. 40, 62-63 (88 SC 1889, 20 LE2d 917) (1968); Ybarra v. Illinois, _____ U. S. _____ (100 SC _____, 62 LE2d

238) (1979). Nor does an arrest alone give rise to the right to search a vehicle parked on the premises. Buday v. State, 150 Ga. App. 686 (258 SE2d 318) (1979).

Nor does it appear that the car was being impounded for which reason an inventory search might have been necessary. Cf. Dunkum v. State, 138 Ga. App. 321 (226 SE2d 133) (1976). Where it is clear that police officers are conducting a warrantless investigatory search without probable cause under the guise of an inventory search, we should "refuse to allow such apparent subterfuges to erode the strictures of the fourth amendment." Gaston v. State, 155 Ga. App. 337, 339 (270 SE2d 877) (1980). The same is true of an "impulse" search which is not, at the time it occurs, a proper caretaking function of the police. State v. McCranie, 137 Ga. App. 369, 370 (223 SE2d 765) (1976). The marijuana found in the

Ford Thunderbird was improperly admitted in evidence against the defendant Moore, and her conviction must accordingly be reversed.

Judgment affirmed in part and reversed in part. Birdsong and Sognier, JJ., concur.

APPENDIX B

FINDINGS OF FACT AND CONCLUSIONS OF LAW - GEORGIA TRIAL COURT

IN THE SUPERIOR COURT OF TATTNALL COUNTY

STATE OF GEORGIA

STATE OF GEORGIA	$	
	$	CRIMINAL ACTION
VS.	$	NO. 79-18
	$	
NORMAN E. WILLIAMS,	$	DEFENDANTS' MOTION
MARION W. MOORE,	$	TO SUPPRESS
DONALD C. DAVIS,	$	
JR., and BERNARD W.	$	
PIANKA	$	

ORDER

STATEMENT OF CASE

The defendants were arrested without a warrant and 45 bales of marijuana were seized by state and local law officers in Tattnall County, Georgia, on February 16, 1979. Other evidence recovered from a mobile home following the arrests was taken pursuant to a search warrant. An additional bale of marijuana was removed from the trunk of a car. The defendants have filed separate motions to suppress all evidence recovered. An evidentiary

hearing has been held and briefs submitted by the prosecution and the defense.

FINDING OF FACT

When defendant Norman Williams came to Tattnall County from South Carolina on May 30, 1978, he bought 1,737 acres of land along the Ohoopee River about 23 miles north-west of the bridge crossing this river near the main gate of the Georgia State Prison at Reidsville. The land included suitable landing facilities for air operations by twin engine airplanes. After landing, an airplane could taxi to within 150 feet of a mobile home the defendant placed in a wooded area a short distance from the runway. Airplane cargo could be hand carried into the mobile home. Trucks and other vehicles could back up to the rear door through the wooded area for unloading cargo from the mobile home.

The defendant called this tract "Beaver Creek Farms". A metal farm gate was put in place across a dirt road about three-fourths of a mile from the mobile home and "No Trespassing" signs were hung on the gate and along some of the fencing erected on part of the land. The river-front land is generally moderately to heavily wooded.

Locally, this tract continued to be known as the "Arnold Place". This is how it was referred to on December 18, 1978, when United States Customs Agent Miles W. Knight spoke with agents of the Georgia Bureau of Investigation (GBI) in States-boro. He informed GBI Agents John J. McGlamery (agent in charge of the States-boro office), William H. Butler and Homer H. Keadle, information had been received that the Arnold Place was recently pur-chased by Norman E. Williams, a South Carolinian, and that Williams' girl friend, defendant Marion Moore, had

bought 250 acres adjoining the farm and added it to the operation. Customs Agent Knight also told these GBI agents that aircraft had been seen going in and out of the Arnold Place and it was suspected by people living in the vicinity that an airborne drug smuggling venture had been set up. The elaborate pig farm operation was considered as front for drug smuggling.

During the next few weeks the GBI conducted discreet inquiry and investigation into this unusual and suspicious activity. Agent Butler examined the land sales records in the Tattnall County Courthouse and learned that the purchase price of the 1,737 acre tract was more than a half-million dollars. The land is in a remote area in the northern portion of Tattnall County and does not hold remarkable prospects for a profitable farming operation.

When Butler discussed the matter with agents of the South Carolina Law Enforcement Division (SLED), defendant Williams' name came up again, matching in several important particulars the profile of a drug smuggler in that state, although he had not been arrested in South Carolina. Butler had conversations with citizens living in the vicinity of the Arnold Place and in the Cobbtown area (a town in Tattnall County about seven (7) miles east of the Ohoopee River) and these added to Butler's knowledge and growing belief that a place for drug smuggling was the real purpose of Beaver Creek Farms. The landing strip, aircraft activity, and defendant Williams' apparent ready access to money was common knowledge in the community. It was not a profile of farmers in the area but it closely resembled the profile of a drug smuggler.

United States Customs Agents also continued their interest and investigation in the activities in the Arnold Place. Knight testified that during the period following his conversation with GBI Agents McGlamery, Butler and Keadle in December, he and four other Customs Agents made several "nonroutine" visits to the farm by going through the fence and observing activity. In January, 1979, during one such visit, he and other agents saw a twin-engined aircraft--mostly silver in color--land, taxi towards the mobile home and, a little later, take off again. The same, or a similar airplane, was seen at another time by the federal agents. This agent also interviewed several families in the community. His beliefs that criminal activity did take place from time to time on the Arnold Place were reinforced from the information developed over a period of several weeks.

The law officers involved, all with wide experience, believed drugs were being brought in by air, off-loaded from the airplane into the mobile home and then transfered immediately out of the mobile home for secret storage in wooded areas on the farm or into waiting cars and trucks for delivery to other dealers. Exposure of the contraband was minimal at all times and happened only when it was being moved from the aircraft to the mobile home or when it might be seen if the smugglers were interrupted and compelled to make hurried disposal.

An 800-foot overcast sky was reported by the Alma Flight Service Station in Alma, Georgia, about forty (40) miles south-west of Reidsville, when according to his log book entry, Georgia State Patrol Pilot William N. Little requested a routine weather briefing at 8:00 A.M. on February 16, 1979. At 10:20 A.M., Little was still at the Georgia State

Patrol's aircraft hangar at the Reidsville Airport, also near the Ohoopee River and about 20 miles southeast of the Arnold Place. He was notified to get ready to fly and to prepare for immediate departure upon arrival of GBI Agent Butler, then enroute to the airport. Within 15 minutes these law officers were flying up the Ohoopee River towards the Arnold Place in GSP Aircraft Number 899SP, a fixed, highwing, slowflying airplane used in traffic control, escapee search and other routine observational tasks assigned state patrol pilots, including Trooper Little.

GBI Agent Butler was in the courthouse in Reidsville that morning when he was contacted from Statesboro by Agent McGlamery. After telephoning Butler and telling him to go to the Reidsville Airport to meet the State Patrol's airplane and to proceed immediately to the Arnold Place, Agent McGlamery departed

Statesboro in a car and also headed towards the Arnold Place. McGlamery told Butler that Customs Agent Knight had called and said he had just received reliable information that an airplane had landed at the Arnold Place, was still there, and that criminal activity--drug smuggling--was believed to be then in progress.

Sergeant Kenneth M. Davis, Reidsville State Patrol Post Commander, was also notified by McGlamery of the suspected happenings. Accompanied by Tattnall County Sheriff Romie Waters, these officers also proceeded from Reidsville directly to the gate at the Arnold Place where they were met there by GBI Agents McGlamery and Martin Moses.

These four lawmen were near the gate when Butler radioed McGlamery a second time from the aircraft. (Three to five minutes earlier Butler had radioed McGlamery that he was observing a twin-

engined aircraft on the ground near the mobile home with cargo door open and that a blue pickup truck with a camper cover over the back was parked at the rear door of the mobile home.) Butler reported that one person was seen moving between the airplane and the mobile home. While circling the area, the aircraft from which Butler was making his observations inadvertently entered some clouds in the area and a view of the area was temporarily lost. Trooper Little testified that he was circling the area at or about 500 feet above ground level.

In this second communication (the first after leaving the cloud cover), Butler told McGlamery that both the aircraft on the ground and the truck at the mobile home had disappeared. Butler then spotted the truck, this time through the woods in an open area near the banks of the Ohoopee River, and reported this to McGlamery. He advised that two men

were in the woods unloading what appeared to both these experienced officers, Butler and Little, as bales of marijuana. This information from the aircraft to the officers on the ground was immediately followed by the advice that two men were hurriedly trying to finish the unloading and get the truck out of the area. The truck was the same one that had been at the mobile home. Instructions as to the location of this truck, the progress of its occupants in completing the off-loading of the marijuana bales, were continually updated to the officers on the ground by Agent Butler from the patrol aircraft.

The officers on the ground, fearing escape and destruction of evidence, forcibly entered upon the lands of the Arnold Place and as Sergeant Davis and Sheriff Waters sped towards the pickup truck in the woods, following continuous instructions from Butler in the aircraft,

Agents McGlamery and Moses were told by Butler that another vehicle, a brown jeep-type truck, was coming around the end of the mobile home with a single occupant at a high speed, headed towards the gate leading into the Arnold Place. McGlamery and Moses saw the truck speeding towards them when, suddenly, it executed a 180-degree turn and raced back towards the woods. It was overtaken and stopped by these agents. The driver was defendant Williams. He was taken into custody by Agent Moses.

Moses stayed with Williams. McGlamery, in one police vehicle, and Sergeant Davis and Sheriff Waters in the other, following instructions from Butler in the airplane, quickly came upon the blue pickup truck in the woods. The sheriff, armed with a shotgun, ordered the occupants to dismount while McGlamery continued towards the cache of marijuana. The occupants of this truck were defend-

ants Bernard W. Pianka and Clement Davis, Jr. Agent McGlamery, directed by Butler from the airplane, continued an additional 200 to 300 feet to an open area near the banks of the Ohoopee and came upon twenty-seven (27) bales of marijuana unloaded by Davis and Pianka.

Trooper Little landed the aircraft, taxied to the mobile home, and with Agent Butler, immediately began securing the area by entering the mobile home. Butler and Little went inside, where they found Mrs. Moore, arrested her for violation of the Georgia Controlled Substances Act, searched her pocketbook for weapons and searched the remainder of the mobile home for other persons and weapons. Finding none, the officers vacated the mobile home with defendant Moore in custody.

Marijuana residue was found in the beds of both the blue pickup truck and the jeep truck. Efforts to secure the scene and protect the evidence were

continued immediately after the defendants were taken into custody. Other persons were known to work on the farm but were not found by the police in this immediate area. However, an additional eighteen (18) bales of marijuana were recovered within a short while, twelve (12) in one cache and six (6) in another, all located several hendred yards from the mobile home in the same general area as were the first twenty-seven (27) bales recovered.

A warrant was obtained for a search of the contents of the mobile home. This search was conducted by other agents of the GBI and among the items located were keys to a Thunderbird automobile, a car rented by Mrs. Moore on February 15 in Savannah. It was parked at the mobile home, a fact already noted and reported earlier by Butler from the airplane. Two cashier's checks each in the amount of $50,000.00, were seized from inside the

mobile home along with a bank deposit slip for $170,000.00. Also seized was ground-to-air radio communications equipment, a marine signal light, aviation radio manuals and another set of car keys (to a Mercury Cougar also parked by the mobile home and also reported being there by Butler from the airplane). This car had been rented by defendant Pianka.

Outside the mobile home near the rear door numerous footprints were found along with cigarette butts and tire tracks. A brown paper bag was recovered containing material suspected to be marijuana.

The defendants were removed from the scene and both rental cars were driven by law officers to the jail on the courthouse grounds in Reidsville. This was in the late afternoon of the same day the four defendants were arrested. Neither car was searched at the scene nor at the sheriff's department and no search war-

rant was requested. Sheriff Waters (who drove one of the cars to the jail) testified, however, that, on the same day, while securing the cars and without intending to make a search, opened the trunk of the Thunderbird after the cars had been brought to Reidsville and in it was a bale of marijuana. He called Agent Butler and this marijuana was also seized. The cars were subsequently released to the rental car companies.

An expert witness for the defense testified that, according to his calculations, a bale of marijuana could not be seen from an aircraft flying at 500 feet. However, the officers involved testified that they had participated in many investigations and raids and that there was no question in their minds but that what they were looking at from the airplane was marijuana bales. They were never in doubt, according to the evidence for the state.

CONCLUSIONS OF LAW

1. Airborne police played a vital role in the capture of the defendants and confiscation of approximately 2700 pounds of marijuana which had been flown into an ostensible pig farm lying along the eastern side of the Ohoopee River in the northwestern neck of Tattnall County. The defendants say the police were trespassers, resulting in an unlawful search and violating their constitutional rights. They demand that the evidence be suppressed.

The Constitutions of Georgia and of the United States both allow use of aircraft in police work, and, in Georgia, this includes an aerial search for contraband. "Even assuming, as appellant contends, that flying over the property of Wesley Reece constituted a trespass, and thus an unlawful search, since 'the special protection accorded by the Fourth

Amendment to the people in their "persons, houses, papers and effects" is not extended to open fields' (Hester v. United States, 265 U.S. 57, 59 [44 SC 445, 68 LE 8981]), the evidence obtained from the aerial search was not inadmissible as the product of an illegal search. See also Kennemore v. State, 222 Ga. 252 (2) (149 SE2d 471); Patterson v. State, 133 Ga. App. 742 (212 SE2d 858)." Reece v. State, 152 Ga. App. 760, 761 (1979). In Reece the complaint was that the officers spotted stolen vehicles from the air which were subsequently seized pursuant to a search warrant.

In the case sub judice, twenty-seven (27) bales of marijuana were confiscated without a warrant contemporaneously with the air surveillance. Another eighteen (18) bales were located in open fields during the securing of the premises. The air and ground operations of the police became inseparable at a given point in

time and, consequently, the question of trespass is relevant. This is so even though the facts are that the marijuana was not actually seen by the officers from the air until it was being unloaded in a wooded area well beyond the curtilage of the mobile home. The officers arrested three defendants without a warrant and confiscated twenty-seven (27) bales of marijuana while acting in direct response to information being transmitted to them from the police aircraft. This is the air-ground cooperation that gives rise to the trespass question.

Were the police in the aircraft trespassers? If the police were not trespassers, the issue of probable cause is not initially involved. "In the field of aviation law, the federal government is the only authority which can and does prescribe the rules and regulations governing aircraft inspection and maintenance. . . [Likewise] Every time an

airplane flies, federal law controls." Doak v. City of Claxton, 140 Ga.App. 588, 590 (1977). The Federal Aviation Regulation pertintent to the flight of the State Patrol aircraft under the flight conditions in this case is F.A.R. 91.105. It provides that an aircraft in open country can be operated not closer than 500 feet of the surface unless in a sparsely populated area or over water in which case the aircraft can be operated not closer than 500 feet from persons or buildings. The evidence is that the aircraft was not operated within 500 feet of any person or building while either the observations of the criminal activity were being made or while the police on the ground were being directed towards the defendants and the contraband. Consequently, defendant Williams' rights were no more violated by the presence of the aircraft than were those of any of his neighbors as the aircraft flew up the

Ohoopee across their lands before reaching the Arnold Place. Fourth Amendment protection has not been extended by any authority binding on this court to any citizen in contravention of the right of other citizens, including police, to use allotted airspace in accordance with Federal Aviation Regulations. Accordingly, the lawful use of such airspace by police in compliance with Federal Aviation Regulations is not, per se, an invasion of privacy nor a trespass. Police in an airplane are necessarily using their investigative powers; not their arrest powers. Whenever a police officer sees something unusual or suspicious, he has not only the right but the duty to investigate. As investigation of sinister facts progresses, probable cause comes ever closer to the surface and, at the proper time, the arrest powers become constitutionally available, followed by the right to

search and seizure evidence in accordance with prescribed rules.

When the officers in the airplane saw what was happening on the ground as a result of their overflight investigation, it was their duty to notify other officers that a crime was in progress: that evidence was being secreted or destroyed; that an unknown number of parties to the crime (the pilot, crew and passengers of the smugglers' airplane) had already escaped and that other parties were attempting to escape. And it was the duty of the officers on the ground, now fully clothed with probable cause, to go upon the lands of defendant Williams; to do so without either an arrest warrant or a search warrant and arrest the perpetrators and seize the contraband. Ga. Code § 27-301.

2. The pursuit of the defendants Pianka and Davis by the law officers on the ground was essential as was their

entry upon the lands through the locked gate. Barclay, et al v. State, 142 Ga.App. 657. While the case being considered is similar to the "hot pursuit" doctrine approved in Warden v. Hayden, 387 U.S. 924, it differs in this: Hayden involved pursuit by officers into a house. The officers here are in "open fields." A farm gate three-fourths of a mile from the mobile home is not the same as the front door of a house. The search uncovering the contraband was well within the limits upheld in Harris v. United States, 331 U.S. 145 as a search incident to a lawful arrest, Kerr v. California, 374 U.S. 23 at pp. 42-43. See also United States v. Lee, 274 U.S. 559 where a Coast Guard Patrol approached a boat on the high seas at night. A search light revealed contraband and the liquor was seized but never offered in evidence. The officers were allowed to testify as to what they had seen. As the court put

it: "A later trespass by the officers, if any, did not render inadmissible in evidence knowledge legally obtained." Lee, at p. 563.

3. Defendant Norman Williams was trying to escape in a vehicle with marijuana seed and resin in it. He was apprehended during the same hectic series of events surrounding the capture of defendants Pianka and Davis. His arrest was lawful and the contraband in his vehicle was properly seized, along with the vehicle itself. Barclay, et al v. State, supra, and Miller v. United States, 357 U.S. 301, 308 (76 SC 1190, 2L.E.2d 1332) involving the use of force to effect an arrest without a warrant.

4. The defendant Marion W. Moore remained in the mobile home while defendants Williams, Pianka and Davis were outside the curtilage as previously described. Moore claims that her warrantless arrest was unauthorized as was a

search of her luggage. These contentions are without merit. An established exception to the requirement of a search warrant is a search incident to a lawful arrest. Ga. Code Ann. §27-301. The policy behind this exception is concern for the officers' safety and evidence on the person of the arrested party might be concealed or destroyed. And, of course, the arrest itself must be lawful for the search to be legal. Brice v. State, 129 Ga. App. 535, Kelly v. State, 129 Ga.App. 131; Bethea v. State, 127 Ga. App. 97. The search must be accomplished essentially at the same time of the arrest, Cupp v. Murphy, 412 U.S. 291 (1973); Kerr v. California, 374 U.S. 23, 42-43, and the search incident to arrest is limited to the area within the defendant's immediate control or reach. Ga. Code Ann. §27-301; Brice v. State, 129 Ga. App. 535. Defendant Moore was arrested and searched, including her pocketbook (not

her luggage) to protect the the officers. The arrest itself was lawful and came about, not as a result of evidence obtained from this defendant upon the security search, but rather in consequence of her apparent participation in a crime which took place in the presence of law officers and for which the participants were being taken into custody by other officers at or about the same time as defendant Moore was apprehended.

To the extent that the premises were searched, this was also incident to a lawful arrest of this defendant in those premises. This is permissible. Shipley v. California, 395 U.S. 818, 820; James v. Louisiana, 382 U.S. 36, 37. An unlimited search is not authorized, Ga. Code Ann. §27-301. Evidence in the case under consideration is that no search of the premises, as such, was made until after a search warrant had been obtained. The officers looked through the trailer

for other defendants in the interest of their safety when they arrested defendant Moore. Finding none, they departed. No evidence was obtained during this officers' security and safety exercise.

The later search of the premises pursuant to a search warrant was fully authorized. The warrant issued on probable cause; marijuana was known to have been passed into the mobile home from an airplane parked near the entrance and then out through the rear door of the mobile home into trucks. There was a strong odor of marijuana when defendant Moore was arrested. Instrumentalities described in the warrant were found and seized along with contraband and other tangible evidence of the crime charged against the defendant Moore and Williams. Ga. Code Ann. §27-303. Checks and deposit slips found and seized are not subject to protection as "private papers" (Code Ann. §27-303(e)) because, under the

evidence now before the court, these items are tangible evidence of the crime charged.

5. Defendant Moore complains that the bale of marijuana removed from the trunk of the rented Thunderbird was seized without a warrant and is unlawful. The facts are that this vehicle and another rented car were at the mobile home all day on February 16. The mobile home was searched pursuant to a warrant. The cars remained untouched all day and, it appears, were not considered by law officers as significant or suspicious. In the late afternoon, the sheriff, possibly then more tired than alert, along with a deputy, drove these cars to the county jail where they were to be turned over to the rental car company owners the following day, or as soon as the companies could send for them. Making a routine check of the cars in securing them for the evening, Sheriff

Waters unlocked the trunk of the Thunderbird and, to his surprise, saw a bale of marijuana.

Was this an unauthorized search? It was not a search at all, according to the sheriff's intent as he expressed it in court. The car was lawfully in the sheriff's custody and the contraband found in it was lawfully appropriated within the authority of South Dakota v. Opperman, 96 S.Ct. 3092 (1976). In that case the Supreme Court addressed the issue of reasonableness in the inventory search context. The police, in Opperman, impounded a vehicle found overparked. It was locked and unoccupied with two parking tickets. The officers saw items of personal property in the car at the station house, and ordered it unlocked. The glove compartment was opened and a bag of marijuana was found. The court found that the initial intrusion was lawful and that the police had not opened

the glove compartment as a mere "pretext concealing an investigatory police motive." So it is in the present case. None of the facts show any pretext to do indirectly what could not have been readily done while the car was still at the mobile home for which a search warrant had issued. That warrant would likely have authorized a search of the car, it being within the curtilage. Bryan v. State, 137 Ga. App. 169; Moon v. State, 120 Ga. App. 141; Bellamy v. State, 134 Ga. App. 340. Bellamy holds that a vehicle may be searched under a search warrant for a residence even if the vehicle is not specified.

6. To the extent that any issue has not been mentioned expressly, it is considered among all others and overruled.

ORDERED, that the motions to suppress filed by each defendant individually, and the motions to suppress con-

sidered together, are hereby overruled upon each and every ground thereof.

This 17th day of April, 1980.

/s/ James E. Findley
James E. Findley, Judge
of the Superior Court of
Tattnall County, Georgia

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ALEXANDER L. STEVAS,
CLERK

NO. 80-1889

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

BERNARD W. PIANKA,
Petitioner,

v.

STATE OF GEORGIA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

BRIEF IN OPPOSITION FOR THE RESPONDENT

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QUESTION PRESENTED

1.

Whether the Court of Appeals of Georgia correctly concluded that under the facts of this instant case Petitioner, who was thoroughly preoccupied in the process of unloading bales of marijuana, possessed a reasonable expectation of privacy from surveillance from an airplane flying at a legal height overhead?

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PART ONE

STATEMENT OF THE CASE

(i)

From his conviction in the Superior Court of Tattnall County on May 9, 1980,

Petitioner pursued a direct appeal to the Court of Appeals of Georgia. On January 28, 1981, the Court of Appeals of Georgia affirmed Petitioner's conviction and sentence, and on February 11, 1981, a motion for a rehearing was denied. On March 13, 1981, Petitioner's petition for a writ of certiorari filed in the Supreme Court of Georgia was denied. Thereafter, this timely petition for a writ of certiorari followed.

(ii)

Pursuant to information received from United State Customs, the Georgia State Patrol dispatched a surveillance plane over a large generally wooded area owned by Williams, one of Petitioner's co-defendants. The land, which partly fronted the banks of the Ohoopee River,

had on it a trailer and airstrip.

The two airborne police officers, a state trooper and a Georgia Bureau of Investigation agent [GBI], flying at a legal height above the ground, spotted an airplane at rest on the airstrip near a trailer in the approximate center of the property, along with two trucks and other cars parked nearby. Under cloud cover the airplane vanished, but one of the trucks was seen in an open area near the river unloading objects which the two airborne police officers rightly assumed to be bales of marijuana. The airborne police officers then notified other police officers on the ground who had arrived outside the fenced premises. These officers immediately shot out the lock of a gate across the road, entered, and following directions given them by

the airborne police officers, proceeded to the river area and arrested Petitioner and co-defendant Davis in the truck. Forty-five bales of marijuana were found secreted under nearby vegetation at the side of the road. Prior to making the aforementioned arrests and discovering the secreted marijuana, the police officers came upon co-defendant Williams in a jeep, who upon seeing the law enforcement officers, attempted an unsuccessful evasive maneuver.

The police officers on the ground met the two airborne police officers who, in the meantime, had landed on the airstrip.

The testimony at trial clearly established that the ground party was too small to contain the premises without

entry, that it took over three hours to return to town and obtain a search warrant [which was obtained for the examination of the trailer], and that the report of State Trooper Little, who was in the surveillance plane, of the activities of the Petitioner and his co-defendants and the resemblance of the observed objects to bales of marijuana, combined with previous information regarding suspected illegal activities at the place of the arrests, all combined to establish probable cause to believe a felony was in progress. The foregoing set of circumstances, coupled with the existing exigent circumstances, made immediate action by the law enforcement officers necessary.

PART TWO

REASONS FOR NOT GRANTING THE WRIT

A. THE COURT OF APPEALS OF GEORGIA CORRECTLY CONCLUDED THAT UNDER THE FACTS OF THIS INSTANT CASE PETITIONER, WHO WAS THOROUGHLY PREOCCUPIED IN THE PROCESS OF UNLOADING BALES OF MARIJUANA, POSSESSED NO REASONABLE EXPECTATION OF PRIVACY FROM SURVEILLANCE FROM AN AIRPLANE FLYING AT A LEGAL HEIGHT OVERHEAD.

As revealed by an examination of the synopsis of the facts of this case as set forth in that portion of this brief labeled Statement of the Case, Petitioner, who had attempted to secret his illegal drug activities by conducting

them in the middle of a large fenced piece of property, was plainly observed in the midst of unloading bales of marijuana by a Georgia State Trooper and a GBI agent flying at a legal height in an airplane overhead. In the Court of Appeals of Georgia Petitioner, relying primarily upon this Court's decision in Katz v. United States, 389 U.S. 347 (1967), unsuccessfully contended that the subject overflight violated his constitutional right to expectations of privacy. Here on this petition for a writ of certiorari Petitioner, in an attempt to acquire issuance of the writ, has overly simplified the opinion of the Court of Appeals of Georgia. Petitioner summarily contends that "[t]he Court of Appeals based its decision on the 'open fields' doctrine of Hester v. United States, 265 U.S. 57 (1924)." (Petition for Writ at 10).

Seeking issuance of the writ, Petitioner has inappropriately framed the issue, as set forth in that portion of his petition labeled "Reasons for Granting the Writ", so as to convey the impression that the Court of Appeals of Georgia summarily opined that the subject surveillance took place in an "open field" thus there existed no unreasonable search.

Contrary to Petitioner's assertions however, an examination of Respondent's Exhibit I reveals that in reaching its conclusion that Petitioner's motion to suppress the seized contraband was properly denied, the Court of Appeals of Georgia properly applied settled federal legal principles to the issue presented. In its analysis of the merits of Petitioner's assertion that the subject overflight violated his constitutional right to

expectations of privacy the appellate court correctly turned to this Court's opinions in Hester v. United States, 265 U.S. 57 (1924), and Katz v. United States, 389 U.S. 347 (1967). After an examination of the aforementioned authorities, along with other cases not cited herein, the appellate court correctly ascertained that not only must Petitioner possess an "expectation of privacy," but that the expectation of privacy must be reasonable or justifiable.

> "The Government's activities in electronically listening to and receiving the Petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourteenth Amendment." Katz v. United States, supra, at 353. Accord, United States v. Freie, 545 F.2d 1217, 1223 (9th Cir. 1976).

In this regard the trial court stated:

> "The mere fact, however, that the person observed has an expectation of privacy is not the whole story; if it were, every harborer of contraband would be entitled to immunity from observation because surely unless he expected to remain undiscovered he would not risk possession of property carrying a highly undesirable penalty. The expectation must be reasonable, ..." Williams v. State, 157 Ga. App. 476, ___S.E.2d ___ (1981).

Applying the proper legal principles, as set forth above, to the facts of this instant case the appellate court found Petitioner's contentions that he possessed not only an expectation of privacy, but also a reasonable expectation of privacy to be without merit. Noting that

the sky, like the road, is a highway over which those licensed to do so may pass so long as they keep a proper vertical distance between their craft and the property of others, the trial court concluded that:

> ". . . it is no more unreasonable to expect an airplane to fly over a farm or wooded area at a legal distance from the ground as provided by federal regulations than to expect a passer-by, whether he be a police officer or not, to look past the strand of barb-wire separating an open field from a highway . . .." Williams v. State, supra, at 477.

The appellate court's conclusion that Petitioner possessed no reasonable expectation of privacy from overflights is especially true under the facts of this instant case as Petitioner chose to

locate his illegal activities in an expansive agricultural area where the use of airplanes by farmers and resulting overflights are usual and everyday occurrences.

As the foregoing analysis reveals, the Court of Appeals of Georgia, applying settled federal legal principles, properly concluded that the aerial observation of Petitioner's illegal activities did not constitute an illegal search and seizure under the Fourth Amendment. Thus, Petitioner's assertions to the contrary are without merit and cannot serve as the basis for the granting of the requested writ.

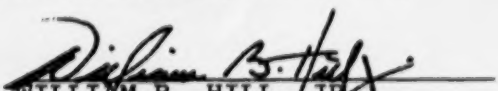
In concluding, the Respondent also notes that aside from his argument that there exists "discord

among the state and federal courts [regarding] the proper interpretation of Hester in a post-Katz era" Petitioner urges no other grounds for the granting of the requested writ of certiorari.

CONCLUSION

This Court should refuse to grant a writ of certiorari to the Court of Appeals of Georgia as it is manifest that no substantial federal question not previously decided by this Court is presented and the decision sought to be reviewed is demonstrably in accord with the applicable decisions of this Court.

Respectfully submitted,



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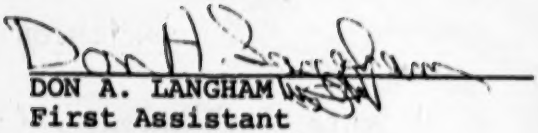

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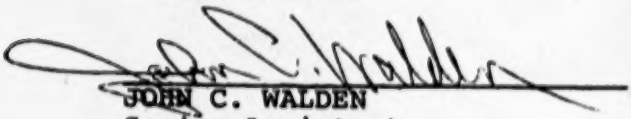

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CERTIFICATE OF SERVICE

I, William B. Hill, Jr., Attorney of Record for the Respondent, and a member of the Bar of the Supreme Court of the United States, certify that in accordance with rules of the Supreme Court of the United States I have this day served a true and correct copy of this Brief for the Respondent in Opposition upon the Petitioner's attorney by depositing a copy of this Brief in the United States mail with proper address and adequate postage to:

Mr. Edwin Marger
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This 24th day of June, 1981.

/s/
WILLIAM B. HILL, JR.

APPENDIX

60871. WILLIAMS, et al. v. THE STATE.

Deen, Presiding Judge.

Williams, Pianka, Davis and Moore were convicted of felony possession of marijuana. We first discuss the motion to suppress of the first three defendants.

1. Pursuant to information received from U. S. Customs, the G.B.I. sent a surveillance plane over a large generally wooded area owned by Williams, having on it a trailer and airstrip, and partly fronting the banks of the Ohoopee River. The occupants saw an airplane on an airstrip near a trailer in the approximate center of the property, along with two trucks and other cars parked nearby. Under cloud cover the airplane vanished but one of the trucks was then seen in an open area near the river unloading objects which

they rightly assumed to be bales of marijuana. They notified other peace officers who had arrived on the ground outside the fenced premises and these men immediately shot out the lock of a gate across the road, entered, and under radio guidance with the G.B.I., the airplane went directly to the unloading scene, arrested Pianka and Davis, and located 45 bales of marijuana under nearby vegetation at the side of the road. Then turning back toward the trailer they came upon Williams in a jeep who, when he saw them, attempted an unsuccessful evasive maneuver.

The defendants first contend that since the area was fenced by strands of barbed wire and locked gate across the road the officers on ground patrol had

no right to enter and conduct the warrantless search; secondly, if they had been held to constitute probable cause, that information itself was tainted as emanating from a surveillance airplane which violated their constitutional right to expectations of privacy.

The expectation of privacy defense is based on Katz v. United States, 389 U.S. 347 (88 SC 507, 19 LE2d 576) (1967) which it is urged has interred the open fields doctrine developed by Hester v. United States, 265 U.S. 57, 59 (44 SC 445, 68 LE 898) (1923) and its progeny. This conclusion is unsupported. Air Pollution Variance Board v. Western Alfalfa Corp., 416 U.S. 861 (94 SC 2114, 40 LE2d 607) (1974). Reece v. State, 152 Ga. App. 760 (264 SE2d 258) (1979). McDowell v. United States, 383 F2d 599(1) (1967). Katz

involved the reasonable expectations of privacy of one making a call from a telephone booth (which had been outfitted with electronic eavesdropping equipment) not to be overheard. This is a far cry from a visual sighting from an airplane which admittedly was flying at a lawful height over the premises. Visual surveillance from an airplane has been held not illegal (People v. Superior Court etc., 37 Cal. App. 3d 836 (112 Cal. Rptr. 764) (1974) unless, as in People v. Sneed, 32 Cal. App. 3d 535 (108 Cal. Rptr. 146) (1973), where the helicopter descended to an elevation of 25 feet or less and thus obviously intruded upon the peace and well being of persons on the ground. The mere fact, however, that the person observed has an expectation of privacy

is not the whole story; if it were, every harborer of contraband would be entitled to immunity from observation because surely unless he expected to remain undiscovered he would not risk possession of property carrying a highly undesirable penalty. The expectation must be reasonable, and it is no more unreasonable to expect an airplane to fly over a farm or wooded area at a legal distance from the ground as provided by federal regulations than to expect a passer-by, whether he be a police officer or not, to look past the strand of barbed wire separating an open filed from a highway and, if he sees an illegal activity in progress, to enter the property for the purpose of arresting the protagonists. The sky, like the road, is a highway over which those licensed to do

so may pass so long as they keep a proper vertical distance between their craft and the property of others. The fact that the information of the defendants' activities was obtained in this manner does not render it unusable.

2. There were two occupants in the airplane which, after flying over the area, landed on the airstrip and met the sheriff and his party. The latter following directions, had proceeded to the river area and arrested the defendants Pianka and Davis in the truck and later stopped and arrested Williams in the jeep. The testimony clearly establishes that the ground party was too small to contain the premises without entry, that it took over three hours to return to town and obtain a search warrant (which was done for the examination of the trailer), and that the

report of Little in the plane of the activities of the defendants and the resemblance of the observed objects to bales of marijuana, combined with previous information regarding suspected activities at that location all combined to establish probable cause to believe a felony was in progress together with exigent circumstances making immediate action necessary. "When a police officer is the informant the reliability of the informant is presumed as a matter of law." Quinn v. State, 132 Ga. App. 395, 396(1) (208 SE2d 263) (1974). Where there is communication between the two, probable cause can rest upon the collective knowledge of the various peace officers involved. Perryman v. State, 149 Ga. App. 54, 56 (3) (253 SE2d 444) (1979). "The exigencies of time and the possible removal of the

contraband to another state created an emergency -- an 'exigent circumstance.' United States v. Rabinowitz, 339 U.S. 56 (70 SC 430, 94 LE 653) (1950)." Andreu v. State of Georgia, 124 Ga. App. 793, 797 (186 SE2d 137) (1971). A later trespass does not render inadmissible in evidence knowledge legally obtained. Hester v. United States, 265 U.S. 57 supra, and see Patterson v. State, 133 Ga. App. 742 (4) (212 SE2d 858) (1976), a case in which Justice, then Judge, Marshall approved Mr. Justice Harlan's concurring opinion in Katz which limns the contrasting natures of an open field and a telephone booth where search and seizure are involved. Id., p. 747.

The law enforcement officers involved had probable cause to enter the Williams property and arrest both defendants found

in the truck and Williams himself, as he apparently attempted to turn away from them in the jeep and re-enter the woods. In the latest case on this subject, Giddens v. State, 156 Ga. App. 258 (274 SE2d 595) (1980), this court reiterated its adherence to the open field doctrine enunciated in Hester v. United States, 265 U.S. 57, supra, but drew a distinction between a non-dwelling structure and one which might be used as a dwelling place, as was the tent in Kelley v. State, 146 Ga. App. 179 (245 SE2d 872) (1978). Since it fell in the latter category the officers very properly refused to search the trailer until after the search warrant had been obtained. The motion to suppress was properly denied and the convictions of Williams, Davis and Pianka are without error.

3. The conviction of Marion Moore, however, rests on a different basis. While the cache of marijuana was being retrieved certain officers returned to town to make affidavit and obtain a search warrant for the trailer. They returned to the farm with this instrument and searched the trailer (from which they had already removed the defendant Marion Moore and placed her under arrest, but without making a further search), later submitting an inventory of items removed from the structure under the search warrant which included the keys to a Ford Thunderbird, one of two rental cars parked outside. This car was driven to town with the intention of returning it to the lessors, but on alighting the police officer unlocked and inspected the trunk of the vehicle and found another bale of marijuana therein.

Although the officers knew at the time they obtained the warrant that various automobiles were parked in close vicinity to the trailer, the warrant asked only permission to search the trailer itself, not the yard or premises or vehicles or any other object in its vicinity. We are constrained to hold that testimony concerning the bale of marijuana found in defendant Moore's automobile was therefore erroneously admitted into evidence. The universally recognized rule is that a search without a warrant is per se unreasonable unless it falls within certain clearly defined exceptions. Schneckloth v. Bustamonte, 412 U.S. 218 (93 SC 2041, 36 LE2d 854) (1973). Bunn v. State, 153 Ga. App. 270, 272 (265 SE2d 88) (1980). On occasion where one, in the course of an intrusion

for which a prior justification exists comes inadvertently upon a piece of incriminating evidence, such evidence is admissible on the basis that no infraction of Fourth Amendment rights was intended. Coolidge v. New Hampshire, 403 U.S. 443 (91 SC 2022, 29 LE2d 564) (1971). The discovery of the bale of marijuana in the trunk of the automobile leased by Ms. Moore is attempted to be justified by means of testimony of the officer involved that he did not intend to search the car, that his removing the keys from the ignition switch, carrying them around to the back of the vehicle and proceeding to unlock and open the trunk was an inadvertent act, and that after the trunk was opened the contraband was in plain view. The act may have been "inadvertent" in the sense that it was normal or

habitual or even that it was the result of ordinary curiosity, but none of these motives would render proper an act otherwise a violation of constitutional requirements.

It is also argued that the right to search the car trunk was permissible because the bailee, Ms. Moore, had been placed under arrest when she emerged from the trailer prior to the obtention of the search warrant and the vehicle might have been searched at that time, in which case the fact that it was first moved to another location would not render the search impermissible. Glover v. State, 139 Ga. App. 162 (227 SE2d 921) (1976). However, this only obtains when the arrest is lawful. No grounds for this defendant's arrest were known at the time it was made. Cf. Beck v. Ohio,

379 U.S. 89, 91 (85 SC 223, 13 LE2d 142) (1974). The only fact known about her at that time was that she was in propinquity with others who were engaged in transferring contraband at a position on the premises about a half mile away. Mere propinquity does not without more justify either arrest or search. Sibron v. New York, 392 U.S. 40, 62-63 (88 SC 1889, 20 LE2d 917) (1968); Yabarra v. Illinois, ___ U.S.___ (100 SC 338, 62 LE2d 238) (1979). Nor does an arrest alone give rise to the right to search a vehicle parked on the premises. Buday v. State, 150 Ga. App. 686 (258 SE2d 318) (1979).

Nor does it appear that the car was being impounded for which reason an inventory search might have been necessary.

Cf. Dunkum v. State, 138 Ga. App. 321 (226 SE2d 133) (1976). Where it is clear that police officers are conducting a warrantless investigatory search without probable cause under the guise of an inventory search, we should "refuse to allow such apparent subterfuges to erode the strictures of the fourth amendment." Gaston v. State, 155 Ga. App. 337, 339 (270 SE2d 877) (1980). The same is true of an "impulse" search which is not, at the time it occurs, a proper caretaking function of the police. State v. McCranie, 137 Ga. App. 369, 370 (223 SE2d 765) (1976). The marijuana found in the Ford Thunderbird was improperly admitted in evidence against the defendant Moore, and her conviction must accordingly be reversed.

Judgement affirmed in part and reversed in part. Birdsong and Sognier, JJ., concur.

Decided January 29, 1981 --

REHEARINGS DENIED FEBRUARY 11, 1981 --

CERT. APPLIED FOR.